

Report on Iowa's Indigent Defense System



December 30, 2011

Samuel P. Langholz
State Public Defender

INTRODUCTION

Iowa's indigent defense system is strong. The more than 200 employees of the State Public Defender System have been efficiently providing high quality representation on more cases than ever before. In Fiscal Year 2011, public defender offices closed more than 87,500 cases, at an average cost per case of \$272.25, and there was a final finding of ineffective assistance of counsel in less than 0.002% of these cases.

Similarly, more than 1,000 contract attorneys continue to provide high quality representation throughout all 99 of Iowa's counties. In Fiscal Year 2011, 70,266 claims were submitted to the indigent defense fund, at an average cost per claim of \$444.42. This was an increase of nearly 5,000 claims from Fiscal Year 2010, yet the total amount spent from the indigent defense fund decreased slightly. Both the increase in productivity of the public defender offices and the initial cost savings from the indigent defense fund appear to be caused at least in part by the expansion of the Public Defender System by 16 positions this past year. Continued savings are expected as the effect of the expansion is fully realized.

This first report pursuant to section 13B.2A of the Iowa Code provides the State Public Defender's recommendations related to the hourly rates paid to court-appointed counsel, the per case fee limitations, and other indigent defense matters.

It does not recommend changes in the statutory rates for court-appointed counsel or adjustments to the per case fee limitations at this time. It does recommend the adoption of several statutory changes that are designed to further improve the quality and efficiency of Iowa's indigent defense system.

BACKGROUND

This report is submitted pursuant to section 13B.2A of the Iowa Code, which provides:

1. The state public defender shall file a written report every three years with the governor and the general assembly by January 1 of a year in which a report is due relating to the recommendations and activities of the state public defender relating to the state indigent defense system. The first such report shall be due on January 1, 2012.
2. The report shall contain recommendations to the general assembly regarding the hourly rates paid to court-appointed counsel and per case fee limitations. These recommendations shall be consistent with the constitutional requirement to provide effective assistance of counsel to those indigent persons for whom the state is required to provide counsel.

Prior to the enactment of the current version of the statute, the now-disbanded Indigent Defense Advisory Commission was required to issue a report every three years making "recommendations to the legislature and state public defender regarding the hourly rates paid to court-appointed counsel and per case fee limitations." Iowa Code § 13B.2A

(2009). The commission issued four such reports, on December 9, 2002, December 15, 2003, December 6, 2006, and November 30, 2007.

HOURLY RATES PAID TO COURT-APPOINTED COUNSEL

Hourly rates for fees to court-appointed counsel for indigents in criminal prosecutions, juvenile court cases, and other authorized proceedings are set by section 815.7 of the Iowa Code. Although the State Public Defender has authority to contract with providers at rates different than the statutory rate, *see* Iowa Code §§ 13B.4(3), 815.7(1), historically the State Public Defender has contracted with attorneys at the statutory rates except for a few special circumstances.¹

For appointments made on or after July 1, 2007, the statutory rates are \$70 per hour for Class A felonies, \$65 per hour for Class B felonies, and \$60 per hour for all other cases. For appointments between July 1, 2006, and June 30, 2007, the rates are \$65 per hour for Class A felonies, \$60 per hour for all other criminal cases, and \$55 per hour for all other cases. For appointments between July 1, 1999, and June 30, 2006, the rates are \$60 per hour for Class A felonies, \$55 per hour for Class B felonies, and \$50 per hour for all other cases.

At this time, the State Public Defender does not recommend a change to the statutory rates. There are currently 1,043 attorneys with active contracts to represent indigent persons in Iowa courts, covering all 99 counties. This is a slight increase from the 1,038 contract attorneys one year ago, and a 14% increase from the 915 contract attorneys ten years ago.

There do not generally appear to be problems finding counsel willing to be appointed to handle the available cases. It will be important to continue to evaluate this issue, however, because as the legal market improves and the overhead expenses of attorneys continue to increase, it may become more difficult to attract and retain competent attorneys to represent indigent persons at the current rates.

It also remains vitally important to ensure that the indigent defense fund, from which the court-appointed attorney fees are paid, is fully funded for the estimated expenditures each fiscal year. Early 2011 was a challenging time for attorneys, and other indigent defense providers, when the State Public Defender was forced to delay making payments on claims because the indigent defense fund had run out of money. For many attorneys, their indigent defense work is a sizable portion of their practice and the delays in payment caused significant hardship. It appears that most attorneys decided to continue doing indigent defense work, but there is a real danger that circumstances like these could cause attorneys – especially some of the most talented and experienced attorneys who have plenty of opportunity for other work – to consider leaving their indigent defense practice. Accordingly, the State Public Defender recommends full funding for the indigent defense appropriations.

¹ Currently, the State Public Defender contracts with several nonprofit organizations, including the Drake Legal Clinic, Youth Law Center, and Linn County Advocate, at alternative rates. The State Public Defender also contracts with individual attorneys in certain counties to handle specialized drug court programs.

PER CASE FEE LIMITATIONS

The State Public Defender is required by section 13B.4(4)(a) to “establish fee limitations for particular categories of cases.” Accordingly, the State Public Defender has adopted administrative rules establishing attorney fee limitations for adult cases, juvenile cases, and appellate cases. *See* Iowa Admin. Code § 493-12.6. A claim by an attorney in excess of the attorney fee limitations established by the State Public Defender will not be paid unless the attorney seeks and obtains prior authorization from the appointing court to exceed the attorney fee limitations. *See* Iowa Code § 815.10A(3); Iowa Admin. Code § 493-12.6(4). Such motions are routinely granted, often at the beginning of a case without any further limitation on fees.

The expense of a court-appointed attorney is ultimately the responsibility of the defendant, who must reimburse the state for the cost of his or her defense. *See* Iowa Code § 815.9; *State v. Dudley*, 766 N.W.2d 606 (Iowa 2009). Yet unlike a privately retained attorney, a court-appointed attorney does not depend on his or her client to receive payment, and discussions regarding finances may be overlooked in the representation. Clients somewhat regularly complain that they were unaware of their reimbursement obligation or the fact that their attorney had a fee limitation that he or she sought to exceed. This problem could be avoided if attorneys were required to obtain the consent of their client prior to seeking to exceed the fee limitations. The State Public Defender is proposing legislation to add this requirement to section 815.10A(3) of the Iowa Code and recommends its adoption by the General Assembly.²

The State Public Defender does not make any further recommendations to the General Assembly regarding the fee limitations. At this time, the current limits appear appropriate in light of the fee rates and the number of hours typically spent on a particular type of case, and the State Public Defender will continue to evaluate the appropriateness of the limitations and will exercise the current statutory authority to adjust the limitations through revisions to the administrative rules if necessary. No further legislative action is necessary.

The current fee limitations established by the State Public Defender, as well as the average cost per claim and maximum claim paid for each type of case are set forth in the charts below.

² The proposed amendment to section 815.10A, subsection 3, would require that except for applications by an attorney or guardian ad litem for a juvenile in a juvenile proceeding, an attorney’s application to exceed a fee limitation must include a statement signed by the attorney’s client, consenting to the application and acknowledging that the client will be required to reimburse the state for the total costs and fees incurred for legal assistance to the extent the person is reasonably able to pay, and prohibits the requirement from being waived by the court.

Adult Cases

Type of Case	Fee Limitation	Average Cost per Claim ³	Maximum Claim Paid
Class A felonies	\$18,000	\$17,245 ⁴	\$75,656
Class B felonies	\$3,600	\$1,791	\$41,210
Class C felonies	\$1,800	\$1,062	\$22,907
Class D felonies	\$1,200	\$745	\$21,609
Aggravated Misdemeanors	\$1,200	\$485	\$14,130
Serious Misdemeanors	\$600	\$406	\$14,892
Simple Misdemeanors	\$300	\$246	\$4,362
Simple Misdemeanor appeals to district court	\$300	\$197	\$480
Contempt/Show Cause Proceedings	\$300	\$176	\$3,792
Chapter 229A Proceedings (civil commitments of sexually violent predators)	\$10,000	\$1,918	\$2,964
Probation Violation	\$300	\$216	\$2,376
Parole Violation	\$300	\$200	\$2,334
Extradition	\$300	\$202	\$924
Postconviction relief	\$1000 or ½ of the fee limitation for the conviction from which relief is sought	\$1439	\$13,212

³ The average cost per claim for all types of claims is calculated using only the expense of the attorney fees claimed, not other expenses for which reimbursement were sought, since they are not included in the fee limitation. The cost per claim includes only completed claims that were paid in Fiscal Years 2010, 2011, and 2012, and is based on the actual amount paid, not the amount originally claimed, if the claim was subsequently reduced by the State Public Defender pursuant to the Iowa Code or Administrative Rules.

⁴ The average cost per claim for Class A felonies is calculated combining multiple claims by a single attorney in a single case, since it is permissible to file interim claims in Class A felonies. Since a defendant is entitled to two attorneys on a Class A, and each attorney is subject to a separate fee limitation, it does not combine the claims by both attorneys. If such claims were combined, the average cost per case for a Class A felony would be \$22,471.

Juvenile Cases

Type of Case	Fee Limitation	Average Cost per Claim	Maximum Claim Paid
Delinquency (through disposition)	\$1,200	\$326 ⁵	\$10,807
Child in Need of Assistance (CINA) (through disposition)	\$1,200	\$447 ⁵	\$14,760
Termination of parental rights (TPR) (through disposition)	\$1,800	\$663 ⁵	\$9,684
Juvenile court review and other postdispositional court hearings	\$300	N/A	N/A
Judicial bypass hearings	\$180	\$122	\$413
Juvenile commitment hearings	\$180	\$130	\$1584
Juvenile petition on appeal	\$600	\$608.72 ⁶	\$1645
Motion for further review after petition on appeal	\$300	N/A	N/A

Appellate Cases⁷

Type of Case	Fee Limitation	Average Cost per Claim	Maximum Claim Paid
Ordinary Appeal	\$2,400	\$1,354	\$8,736
Appeal from which attorney withdraws after determination that appeal is frivolous	\$1,200	N/A	N/A
Appeal in which attorney joins in all or part of the brief of another party	\$600	N/A	N/A

⁵ These costs include both the initial claims through disposition as well as the other postdispositional claims capped at the \$300 rate.

⁶ These costs include all claims for juvenile petitions on appeals, including motions for further review.

⁷ The appellate fee limitations apply only to an attorney who does not have an appellate contract with the State Public Defender, and such attorneys may only be appointed if the court determines that no contract attorney is available and the State Public Defender consents. There are sufficient contract attorneys available that this has been unnecessary, and accordingly the claims data is from contract attorney claims. All types of appeals are included in the cost calculations.

OTHER RECOMMENDATIONS

In addition to the proposed statutory change with respect to fee limitations noted above, the State Public Defender recommends the adoption of several additional statutory revisions that will be included in the legislative proposal by the State Public Defender this legislative session. These revisions include responses to two recent Iowa Supreme Court decisions, *Simmons v. State Public Defender*, 791 N.W.2d 69 (Iowa 2010), and *State v. Dudley*, 766 N.W.2d 606 (Iowa 2009), an additional change with respect to client notification of financial obligations, and several changes that improve the flexibility of the State Public Defender to deliver indigent defense services in the most efficient manner. Each of these changes has the potential to improve the quality and cost-effectiveness of indigent representation in Iowa.

In response to *Simmons*, which held that the State Public Defender lacked statutory authority to promulgate administrative rules setting a fixed fee contract rate for appellate appeals, the State Public Defender recommends clarifying that such authority does exist by amending section 13B.4(3) to state that a contract entered into by the State Public Defender with an attorney or nonprofit organization may provide expressly, or in administrative rules incorporated into the terms of the contract, that the attorney or organization may be paid on a basis other than an hourly rate, including but not limited to a fixed rate per case or a fixed rate per month.

The State Public Defender also recommends revising the recoupment provisions, requiring the reimbursement of expenses for costs and fees for legal assistance, to address the constitutional infirmities found to exist in the *Dudley* case. This would remove the limitation on reimbursement amounts in public defender cases, so that both public defender and contract attorney clients would pay the entire amounts owed; add required due process protections for parties not subject to the restitution provisions, including required consideration of ability to pay; and clarify the interaction of this statute and the restitution and juvenile proceedings chapters. This proposal could lead to increased collection of legal expenses for the general fund, and would update the statutory scheme to be consistent with the constitutional requirements articulated in *Dudley*.

Similar to the proposal to require an attorney's application to exceed SPD fee limitations to include a statement signed by the indigent defendant, consenting to the application and acknowledging that the defendant's reimbursement obligations, the State Public Defender proposes requiring an attorney's application to secure an expert witness to include a statement that the attorney advised the client of the application and the reimbursement obligations. Currently, many defendants are unaware of their reimbursement obligations or that their attorney requested permission to exceed the fee limitations or incurred expert expenses until the end of the case when ordered to repay the funds. The addition of these requirements prevents that from happening and thus gives the defendant more authority to control the cost of the representation, which may assist in containing costs.

The State Public Defender also recommends revising the appointment procedure in appellate cases set forth in section 814.11 to specify a process for the state appellate defender to transfer a case to a successor designee if the state appellate defender is not able to handle an appeal, and to clarify that a private attorney must have a contract specifically for appellate services. This would

permit the handling of conflict appellate cases by another public defender office or a designated attorney or nonprofit organization. In addition, the State Public Defender recommends clarifying that an indigent defense contract is county and type-of-case specific, thus requiring the court to give preference to the appointment of an attorney with a contract to handle the type of cases in the county in which the case arises, and clarifying that a defendant in a Class A felony who privately retains an attorney is not eligible for a second court-appointed attorney to assist the privately retained attorney. Both of these clarifications could avoid potential future litigation over the State Public Defender's current interpretation of the statute.

CONCLUSION

The Office of the State Public Defender will continue to strive towards its mission: to ensure that all indigent persons in Iowa are provided high-quality legal representation in criminal, juvenile, and other eligible proceedings in the most efficient and fiscally responsible manner. Each of the recommendations in this report advance this mission, and the State Public Defender will continue to look for opportunities to improve the quality of representation and achieve efficiencies so that the State of Iowa can use its limited resources for indigent defense in the most cost-effective manner.

The State Public Defender is in the early stages of planning for a transition to an online indigent defense claim submission system, which offers an opportunity for cost savings and improvement of the delivery of services to indigent defense providers. We are also exploring an increased use of specialized contracts with attorneys and other indigent defense providers, and continuing to evaluate the targeted expansion of public defender offices.

With the cooperation of other key stakeholders, including the Governor, General Assembly, Judiciary, and private attorneys, there is little doubt that Iowa's strong indigent system will continue to grow stronger.